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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM R. LUMMIS, Temporary Administrator of the Estate of Howard R. Hughes, Deceased, et al.,
Petitioners

v.

LOS ANGELES AIRWAYS, INC.,
Respondent

Petition For Writ Of Certiorari To The Court of Civil Appeals, 14th Supreme Judicial District of Houston, Texas

REPLY BRIEF ON CERTIORARI FOR PETITIONER WILLIAM R. LUMMIS

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ARGUMENT

LAA's Brief in Opposition raises, but fails to answer, a crucial question which this Court should now resolve: What legitimate state purpose is served by arbitrarily denying the statute of limitations defense to a defendant when such defendant was, under LAA's own allegations,

both subject to the jurisdiction of the courts of Texas and amenable to service of process?

As LAA acknowledges, a tolling statute must rationally further a legitimate state purpose (Opp. Br., p. 13). The purpose of the Texas tolling statute is plain: it is to "protect domestic creditors 'from the inconvenience and loss they would be exposed to by the absence of their debtors from process and judgment.' " *Gibson v. Nadel,* 164 F.2d 970, 971 (5th Cir. 1947), citing *Love v. Doak,* 5 Tex. 343 (Tex. 1849); *Snoddy v. Cage,* 5 Tex. 106 (Tex. 1849); *Moore v. Hendrick,* 8 Tex. 253 (Tex. 1852). The purpose of the Texas limitations statutes is equally plain. As this Court has noted, limitations statutes "represent a pervasive legislative judgment . . . 'that the right to be free from stale claims comes in time to prevail over the right to prosecute them.' " *United States v. Kubrick,* 444 U.S. 111, 100 S.Ct. 352, 357 (1979). In short, defendants should have the right to a reliable defense.

The issue here is not whether tolling statutes or statutes of limitations should exist at all, but whether a state can apply such statutes in an unevenhanded and discriminatory manner. This Court, in *World-Wide Volkswagen Corp. v. Woodson,* ____U.S.____, 100 S.Ct. 559, 567 (1980), recently stated that

> the Due Process Clause, by ensuring the "orderly administration of the laws" [citation omitted] gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.

Lummis submits that the Due Process Clause should also afford defendants the same protection as to *when and for how long* their conduct will render them liable to suit. This Estate is entitled to a reliable defense. (Laches is inadequate because this is not an equity proceeding.) Had Mr. Hughes been physically present in Texas during the relevant time period, Texas law would not now require his Estate to defend against a plaintiff who could have filed its suit timely but simply neglected to do so. Texas law does not deny an out-of-state defendant other defenses, e.g., contributory negligence, that are available to resident defendants, and should not carve out an exception for the limitations defense. Where both out-of-state and resident defendants are amenable to service of process under Texas law, they are similarly situated and both should be allowed the benefit of a statute of limitations defense. It makes no sense for this California plaintiff to sue on the same case for the sixth time in Texas seven years after its cause of action arose.

The courts in 38 states have achieved a balance between the right of a plaintiff to sue and a defendant to repose in a way that deprives neither party of the Fourteenth Amendment guarantees of equal protection and due process of law to which he is entitled. Where a state specifically has a long-arm statute that can reach the people affected by the tolling statute, these courts have decided that the purpose of their tolling statutes is better served by their long-arm statutes. To hold otherwise, reasoned the court in *Wright v. Keiser*, 568 P.2d 1262 (Okla. 1977),

> would mean that . . . actions would never be barred against non-residents. Residents of our 49 sister

> states would always be in peril of being subjected to litigation about events which occurred in the distant past and . . . in some situations that threat would remain even against their estates. The proper time for commencement of litigation against nonresidents would be controlled only by the whim, caprice, and convenience of plaintiffs. *Id.* at 1265.

This is exactly what has happened in this case. Prior to Hughes' death in 1976, LAA filed suits involving the same facts and alleged contract against Hughes or a Hughes entity in federal courts and state courts in California, and after his death, LAA filed identical suits against the Hughes Estate in Nevada and Texas.[1]

If defendants are deprived of the statutes of limitations defense, plaintiffs would be encouraged to delay litigation until memories fade and witnesses die (as several have here) or become unavailable. Less obvious but equally harmful consequences are that plaintiffs, having either delayed too long in their own states, or having litigated and lost there, will seek out forums where tolling statutes have been construed to deny nonresident defendants any limitations defense. In today's highly mobile society, where increasing numbers of people reside in more than one jurisdiction in their lifetime, the experiences of the Hughes Estate will undoubtedly be repeated. Our modern society demands that an individual be afforded the right to travel and neither he nor his estate should be penalized for the exercise of that right. Due process and equal protection require that the individual who exercises his right to travel be treated evenhandedly with his fellow citizens who choose to stay at home, when both are

1. A complete list of this duplicative litigation appears in Petition for Certiorari, p. 4 at n. 1.

similarly situated. Due process and equal protection require that if a state holds a defendant subject to its long-arm jurisdiction, it must also afford him the protection of a limitations defense.

LAA's attempt to distinguish *Wright v. Keiser* by arguing that actual notice of service in this case was necessary is incorrect (Opp. Br., pp. 15-16). LAA's complaint alleges (without a shred of supporting evidence) that Mr. Hughes was domiciled in Texas during the relevant time period. Under *Milliken v. Meyer*, 311 U.S. 457 (1940), this alone would have conferred *in personam* jurisdiction over Mr. Hughes if an appropriate means of substituted service was available. Texas provides for substituted service for out-of-state defendants through Rule 108, TEX. R. CIV. P., and if that is unsuccessful, service by publication through Rule 109, TEX. R. CIV. P. (Both these rules are contained in Petition for Certiorari, Appendix G.) Furthermore, under Rule 109, Mr. Hughes' absence from the United States (Opp. Br., p. 2) during the relevant time period would have made it *easier* for LAA to serve Mr. Hughes than if he had remained in the United States. (See Rule 109, last sentence, Petition for Certiorari, Appendix G.).

If LAA had availed itself of Rule 109, and Mr. Hughes had failed to answer or appear within the prescribed time, LAA would have been able under Rule 244, TEX. R. CIV. P., to proceed to a judgment. Rule 244 provides:

> Where service has been made by publication, and no answer has been filed nor appearance entered within the prescribed time, the court shall appoint an attorney to defend the suit in behalf of the defendant, and judgment shall be rendered as in other cases; but, in every such case a statement of the evidence,

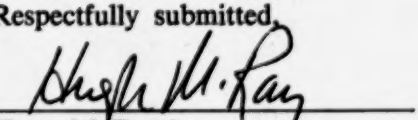
> approved and signed by the judge, shall be filed with the papers of the cause as a part of the record thereof. The court shall allow such attorney a reasonable fee for his services, to be taxed as part of the costs.

Texas courts have sustained judgments obtained under Rules 109 and 244, even when (as LAA claims on page 16 of its Brief in Opposition) the plaintiff is unsure whether the defendant is still alive at the time of filing its suit. *Donaldson v. First State Bank of Abernathy*, 352 S.W.2d 302, 303 (Tex. Civ. App.—Amarillo 1962, writ ref'd n.r.e.). Mr. Hughes, then, was amenable to substituted service of process in this case, and LAA should not now be heard to complain of possible difficulties in serving Mr. Hughes when it never tried to do so in Texas.

LAA has failed completely to show that any legitimate purpose of the State of Texas is served by allowing a California corporation that has no connection with Texas to relitigate a suit that has no connection with Texas some seven years after its alleged cause of action arose and after it has unsuccessfully litigated the same cause of action outside the state of Texas five times already. Lummis respectfully submits that the legitimate purpose of the Texas tolling statute can be fully served, and the issues of this case can be fairly resolved in terms of the presence of the defendant within the jurisdiction. When the plaintiff's right to pursue his claim is not suspended because he can obtain jurisdiction and process over the defendant, then the tolling statute should not be applied, and the limitations statute should not be suspended.

Accordingly, this Petition for Certiorari should be granted and the judgment of the court below reversed.

Respectfully submitted,



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